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1. Relevant provisions of the Missouri Human Rights Act, Mo.Rev.Stat., Chapter 213:

213.030 Powers and duties of commission -- rulemaking, procedure, review. -- 1. The powers and duties of the commission shall be:

(1) To seek to eliminate and prevent discrimination because of race, color, religion, national origin, ancestry, sex, age as it relates to employment, handicap, or familial status as it relates to housing and to take other actions against discrimination because of race, color, religion, national origin, ancestry, sex, age, handicap, or familial status as provided by law; and the commission is hereby given general jurisdiction and power for such purposes;

(2) To implement the purposes of this chapter first by conference, conciliation and persuasion so that persons may be guaranteed their civil rights and goodwill be fostered;

(3) To formulate policies to implement the purposes of this chapter and to make recommendations to agencies and officers of the state and political subdivisions in aid of such policies and purposes;

(4) To appoint such employees as it may deem necessary, fix their compensation within the appropriations provided and in accordance with the wage structure established for other state agencies, and prescribe their duties;

(5) To obtain upon request and utilize the services of all governmental departments and agencies to be paid from appropriations to this commission;

(6) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter and the policies and practices of the commission in connection therewith;

(7) To receive, investigate, initiate, and pass upon complaints alleging discrimination in employment, housing or in places of public accommodations because of race, color, religion, national origin, ancestry, sex, age as it relates to

employment, handicap, or familial status as it relates to housing and to require the production for examination of any books, papers, records, or other materials relating to any matter under investigation;

(8) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, to take the testimony of any person under oath, and, in connection therewith, to require the production for examination of any books, papers or other materials relating to any matter under investigation or in question before the commission;

(9) To issue publications and the results of studies and research which will tend to promote goodwill and minimize or eliminate discrimination in housing, employment or in places of public accommodation because of race, color, religion, national origin, ancestry, sex, age as it relates to employment, handicap, or familial status as it relates to housing;

(10) To provide each year to the governor and to the general assembly a full written report of all its activities and of its recommendations;

(11) To adopt an official seal;

(12) To cooperate, act jointly, enter into cooperative or work sharing agreements with the United States Equal Employment Opportunity Commission, the United States Department of Housing and Urban Development, and other federal agencies and local commissions or agencies to achieve the purposes of this chapter;

(13) To accept grants, private gifts, bequests, and establish funds to dispose of such moneys so long as the conditions of the grant, gift, or bequest are not inconsistent with the purposes of this chapter and are used to achieve the purposes of this chapter;

(14) To establish a human rights fund as defined in section 213.010, for the purposes of administering sections 213.040, 213.045, 213.050, 213.070, 213.075, and 213.076.

2. No rule or portion of a rule promulgated under

the authority of this chapter shall become effective until it has been approved by the joint committee on administrative rules in accordance with the procedures provided herein, and the delegation of the legislative authority to enact law by the adoption of such rules is dependent upon the power of the joint committee on administrative rules to review and suspend rules pending ratification by the senate and the house of representatives as provided herein.

3. Upon filing any proposed rule with the secretary of state, the filing agency shall concurrently submit such proposed rule to the committee, which may hold hearings upon any proposed rule or portion thereof at any time.

4. A final order of rulemaking shall not be filed with the secretary of state until thirty days after such final order of rulemaking has been received by the committee. The committee may hold one or more hearings upon such final order of rulemaking during the thirty-day period. If the committee does not disapprove such order of rulemaking with the thirty-day period, the filing agency may file such order of rulemaking with the secretary of state and the order of rulemaking shall be deemed approved.

5. The committee may, by majority vote of the members, suspend the order of rulemaking or portion thereof by action taken prior to the filing of the final order of rulemaking only for one or more of the following grounds:

(1) An absence of statutory authority for the proposed rule;

(2) An emergency relating to public health, safety or welfare;

(3) The proposed rule is in conflict with state law;

(4) A substantial change in circumstance since enactment of the law upon which the proposed rule is based.

6. If the committee disapproves any rule or portion thereof, the filing agency shall not file such disapproved portion of any rule with the secretary of state and

the secretary of state shall not publish in the Missouri Register any final order of rulemaking containing the disapproved portion.

7. If the committee disapproves any rule or portion thereof, the committee shall report its findings to the senate and the house of representatives. No rule or portion thereof disapproved by the committee shall take effect so long as the senate and the house of representatives ratify the act of the joint committee by resolution adopted in each house within thirty legislative days after such rule or portion thereof has been disapproved by the joint committee.

8. Upon adoption of a rule as provided herein, any such rule or portion thereof my be suspended or revoked by the general assembly either by bill or, pursuant to section 8, article IV of the constitution, by concurrent resolution upon recommendation of the joint committee on administrative rules. The committee shall be authorized to hold hearings and make recommendations pursuant to the provisions of section 536.037, RSMo. The secretary of state shall publish in the Missouri Register, as soon as practicable, notice of the suspension or revocation.

213.055. Unlawful employment practices. - 1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

(b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

(2) For a labor organization to exclude or to expel from its membership any individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer because of race, color, religion, national origin, sex, ancestry, age or handicap of any individual; or to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap; or for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs to discriminate against any individual because of his race, color, religion, national origin, sex, ancestry, age or handicap in admission to, or employment in, any program established to provide apprenticeship or other training;

(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, color, religion, national origin, sex, ancestry, age or handicap unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, national origin, sex, ancestry, age as it relates to employment or handicap, or to classify or refer for

employment any individual on the basis of his race, color, religion, national origin, sex, ancestry, age or handicap.

2. Notwithstanding any other provision of this chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences or such systems are not the result of an intention or a design to discriminate, and are not used to discriminate, because of race, color, religion, sex, national origin, ancestry, age or handicap, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration, or action upon the results thereof, is not designed, intended or used to discriminate because of race, color, religion, national origin, sex, ancestry, age or handicap.

3. Nothing contained in this chapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to his chapter to grant preferential treatment to any individual or to any group because of the race, color, religion, national origin, sex, ancestry, age or handicap of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, national origin, sex, ancestry, age or handicap employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, national origin, sex, ancestry, age or handicap in any community, state, section, or other area, or in the available

work force in any community, state, section, or other area.

213.075 Complaints to commissions, how filed, when -- filing with federal agencies, effect -- duties of executive director -- respondents -- hearing, notice, procedure -- attorney general to represent commission -- appeal, discovery -- effect of orders of commission. -- 1. Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the commission a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination, which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice and which shall set forth the particulars thereof and such other information as may be required by the commission. The complainant's agent, attorney or the attorney general may, in like manner, make, sign and file such complaint.

2. Any complaint which is filed with the federal Equal Employment Opportunity Commission or other federal agencies with which the commission has a work-sharing or deferral agreement, or with a local commission which has been certified as substantially equivalent by the commission, shall be deemed filed with the commission on the date that such complaint is received by such federal agency or local commission. A copy of all complaints filed with a local commission with the authority to enforce the provisions of this chapter is to be forwarded to the commission within seven days of the filing thereof with such local commission. If a local commission has jurisdiction to hear a complaint filed with the commission, such complaint shall be deemed to have been filed with the local commission on the date on which such complaint was filed with the commission. The commission shall, within seven days of the receipt of a complaint which a local commission has jurisdiction to hear, forward a copy thereof to such local commission.

3. After the filing of any complaint, the executive director shall, with the assistance of the commission's staff, promptly investigate the complaint, and if the director determines after the investigation that probable cause exists for crediting the allegations of the complaint, the executive director shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion, and shall report the results to the commission. The investigation, determination of probable cause and conciliation shall be conducted according to such rules, regulations and guidelines as the commission shall prescribe.

4. A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, pursuant to such rules, regulations, and guidelines as the commission shall prescribe. Such notice, in addition to complying with the requirements of such rules, regulations, and guidelines, shall also state the reason why the person to whom the notice is addressed has been joined as a party.

5. In case of failure to eliminate such discriminatory practice as found in the investigation, if in the judgment of the chairperson of the commission circumstances so warrant, there shall be issued and served in the name of the commission, a written notice, together with a copy of the complaint, as it may have been amended, requiring the person named in the complaint, hereinafter referred to as "respondent", to answer the charges of the complaint at a hearing, at a time and place to be specified in the notice, before a panel of at least three members of the commission sitting as the commission or before a hearing examiner licensed to practice law in this state who shall be appointed by the executive director an approved by the commission. The place of the hearing shall be in the office of the commission or such other place designated by it, except that

if the respondent so requests, in writing, the hearing shall be held in the county of such person's residence or business location at the time of the alleged unlawful discriminatory practice. A copy of the notice shall also be served on the complainants.

6. In all cases where a written notice of hearing has been issued and a party has not elected the option to proceed in circuit court as set forth in section 213.076, the procedures set forth for a hearing shall apply.

7. The commission shall be a party to the action and shall be represented before the panel or the hearing examiner by the office of the attorney general or, when so delegated by the attorney general, a staff attorney of the commission. Neither the hearing examiner nor any member of the panel shall have participated in the investigation of the complaint. Evidence concerning endeavors at conciliation shall be excluded.

8. The respondent may file a written verified answer to the complaint and appear at the hearing in person or otherwise with or without counsel, and submit testimony. At the discretion of the hearing examiner or the panel, the complainant may be allowed to intervene, thereby becoming a party to the action with the right to present testimony in person or by counsel, provided the complainant at all times shall be treated as a party for the purpose of discovery and the taking of depositions. The commission or complainant intervenor shall have the power to reasonably and fairly amend any complaint, and the respondent shall have like power to amend any answer. The testimony taken at the hearing shall be under oath and be transcribed.

9. In any contested case before the commission, any party may take and use written interrogatories, requests for production of documents and other materials, and requests for admissions, and all other forms of discovery authorized by rules of civil procedure in the same manner, upon, and under the same conditions, and upon the same notice, as is or may

hereafter be provided for with respect to the taking and using of written interrogatories, requests for production of documents and other materials, and requests for admissions, and all other forms of discovery authorized by rules of civil procedure in civil actions in the circuit court. The panel or hearing examiner shall have the authority to impose sanctions in the same manner as set forth in the rules of civil procedure.

10. The hearing shall be conducted in the manner provided by chapter 536, RSMo.

11. When the case is heard by a panel of the commission, the chairperson of the commission shall select the hearing panel and the presiding officer. The presiding officer shall have full authority to call and examine witnesses, admit or exclude evidence and rule upon all motions and objections. The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

(1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to, payment of backpay; hiring; reinstatement or upgrading; restoration to membership in any respondent labor organization; the extension of full, equal and unsegregated housing; the extension of full, equal and unsegregated public accommodations; extension of a commercial real estate loan or other financial assistance; extension or restoration of membership or participation in any multiple listing service or other real estate service organization or facility; payment of actual damages; and the submission of a report of the manner of compliance;

(2) That a respondent has engaged or is about to engage in a violation of section 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of section 213.070 relates to or involves a violation of one or more of such other sections or relates to or involves the encouraging, aiding, or abetting of a violation of such other sections, the commission may, in addition to the relief provided in subdivision (1) of this subsection*, assess a civil penalty against the respondent, for purposes of vindicating the public interest:

(a) In an amount not exceeding two thousand dollars if the respondent has not been adjudged to have violated one or more of the sections enumerated in subdivision (2) of this subsection within five years of the date of the filing of the complaint;

(b) In an amount not exceeding five thousand dollars if the respondent has been adjudged to have committed one violation of the sections enumerated in subdivision (2) of this subsection within five years of the date on which the complaint is filed;

(c) In an amount not exceeding ten thousand dollars if the respondent has been adjudged to have committed two or more prior violations of the sections enumerated in subdivision (2) of this subsection within seven years of the date on which the complaint is filed. All civil penalties set forth in this subsection shall be paid to the human rights fund.

12. If, upon all the evidence, the panel finds that a respondent has not engaged in any unlawful discriminatory practice, the panel shall state its findings of fact and conclusions of law and shall issue and cause to be served on the complainant and respondent an order dismissing the complaint.

13. When the case is heard by a hearing examiner, the examiner shall have all powers described in subdivision (8) of section 213.030 and subsection 11 of this section, for

the purpose of the hearing. The hearing examiner shall make findings of fact and conclusions of law and shall recommend to the commission an order granting such relief as provided in subsection 11 of this section or dismissing the complaint as to the respondent as provided in subsection 12 of this section, in accordance with such findings.

14. A panel of at least three members of the commission, sitting as the commission, shall review the record, findings and recommended order of the hearing examiner. The panel shall thereafter accept or amend the recommended order which shall become the order of the commission. All orders shall be served on the complainant and respondent, and copies shall be delivered to the attorney general and such other public officers as the commission deems proper.

15. No order of the commission issued pursuant to this section shall affect any contract, sale, encumbrance or lease consummated before the issuance of such order and involving a bona find purchaser without actual notice of the charge filed pursuant to this section.

16. Any person aggrieved by an order of the commission may appeal as provided in chapter 536, RSMo.

*Word "section" appears in original rolls.

2. Title 9 of the United States Code provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2635

Merrill Lynch, Pierce, Fenner and Smith, Inc., a Delaware Corporation,	*	
Appellee,	*	
v.	*	Appeal from the United States District Court for the Western District of Missouri
Jeremiah W. Nixon, Attorney General, State of Missouri; Keith D. Halcomb, Assistant Attorney General, State of Missouri; Missouri Commission on Human Rights; Gerald P. Gretman, Chairperson, Missouri Commission on Human Rights; Donna Cavitts, Executive Director, Missouri Commission on Human Rights Geraldine Johnson, Commissioner; Sterling Adams, Commissioner, and Nancy Reynolds, Presiding Commissioner,	*	
Appellants.	*	

Submitted: February 18, 2000

Filed: April 24, 2000

Before WOLLMAN, Chief Judge, and BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge

When Merrill Lynch, Pierce, Fenner and Smith, Inc. (Merrill Lynch), filed a complaint seeking an order enjoining the Missouri Commission on Human Rights and certain state officers (collectively in this opinion, MCHR, unless otherwise noted) from proceeding in an administrative action with discrimination claims against Merrill lynch, the district court issued an order limiting the forms of relief that the MCHR could seek from Merrill Lynch in the administrative action. The MCHR appeals from this order and we affirm in part and vacate in part.

I.

When Anthony Hoskins was terminated from his employment as a stockbroker with Merrill Lynch, he submitted several claims to arbitration, asserting among other things that his termination violated Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e through §2000e-17, and the Missouri Human Rights Act, *see* Mo. Rev. Stat. §§213.010-213.137. The submission of his claims to arbitration was pursuant to an employment contract known as a "Form U-4," which Mr. Hoskins signed at the commencement of his employment with Merrill Lynch, and that provides that the employee must submit certain employment-related disputes to arbitration. The arbitrator

ultimately found against Mr. Hoskins and dismissed his claims with prejudice.

While Mr. Hoskins's dispute was pending in arbitration, he filed an administrative complaint with the MCHR. Some time after the arbitrator found against Mr. Hoskins, the MCHR initiated an administrative action against Merrill Lynch, contending that Merrill Lynch had violated rights guaranteed to Mr. Hoskins under Missouri law. Merrill Lynch then filed this complaint in federal court, seeking to enjoin the MCHR from proceeding with its administrative action. Merrill Lynch argued that, in light of the arbitrator's decision to dismiss Mr. Hoskins's claims with prejudice, the Federal Arbitration Act, *see* 9 U.S.C. §§ 1-16, precluded the MCHR from bringing its administrative action against Merrill Lynch. The district court enjoined the MCHR from seeking monetary relief on behalf of Mr. Hoskins in its administrative action but refused to enjoin it from seeking injunctive relief on his behalf in that action.

II.

The MCHR first argues that the district court incorrectly found that Merrill Lynch's complaint presented a federal question. The MCHR points out that its administrative action against Merrill Lynch is based only on state law, and argues that under the well-pleaded complaint rule federal-question jurisdiction exists only if "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The MCHR contends that since the Federal Arbitration Act provides Merrill Lynch with, at most, a federal defense to state-law claims, no basis exists for federal-

question jurisdiction. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14, 18-19 (1983).

The MCHR's argument is off the mark, however, because "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). It seems to us that the key questions are whether the federal arbitration statutes create some federal right for Merrill Lynch, and whether the actions of the MCHR in this case would interfere with that right. We believe that the answer to both questions is yes. The statutes specifically provide that arbitration agreements will be "enforceable," *see* 9 U.S.C. § 2, and, for reasons that we discuss in greater detail in the next sections, we think that the efforts of the MCHR to proceed with its administrative claims would interfere with this right. Given the language in *Shaw*, 463 U.S. at 96 n.14, therefore, we hold that Merrill Lynch's complaint properly presents a federal question and that the district court had subject-matter jurisdiction to hear it. *See also Fleet Bank, National Association v. Burke*, 160 F.3d 883, 887-88 (2nd Cir. 1998), *cert. denied*, 119 S. Ct. 2340 (1999).

The MCHR advances three arguments in support of its contention that the arbitrator's ruling against Mr. Hoskins does not bar the MCHR from proceeding with its administrative action against Merrill Lynch. The MCHR argues, first, that an arbitration clause cannot preclude Mr. Hoskins from asserting his statutory rights, and therefore could not preclude the MCHR from asserting Mr. Hoskins's statutory rights on his behalf. Second, the MCHR maintains

that even if Mr. Hoskins himself is precluded from asserting his statutory rights, the MCHR is not. Finally, the MCHR asserts that even if an arbitration clause could bar both Mr. Hoskins and the MCHR from asserting Mr. Hoskins's statutory rights, the arbitration clause in this case does not do so. We address each of these arguments in turn.

III.

The MCHR argues that even if an employee is required to arbitrate claims under an arbitration agreement, that does not preclude the employee from later raising the same claims in court. We disagree. We have specifically held that an arbitrator's award constitutes a final judgment for the purposes of collateral estoppel and *res judicata*. *See Val-U Construction Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581-82 (8th Cir. 1998). In this case, Mr. Hoskins had a full and fair opportunity to litigate his statutory claims in an arbitral forum, he did so, and he lost. Under both federal and Missouri law, the principles of *res judicata* and collateral estoppel bar Mr. Hoskins from subsequently relitigating these same claims, *see id.* at 582 and *Hoelscher v. Patton*, 842 S.W.2d 127, 128 (Mo. Ct. App. 1992).

The MCHR also suggests that even if the arbitrator's decision would ordinarily have a preclusive effect, it does not when a statutory right, and in particular a right under Title VII, is the subject of the arbitration. The MCHR directs our attention to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 43, 49 (1974), in which a plaintiff who lost an arbitration hearing subsequently filed a complaint under Title VII. The *Alexander* Court denied any preclusive effect to the arbitrator's decision on the ground that the arbitrator was

ruling only on the plaintiff's "contractual rights" under a collective bargaining agreement, *id.* at 53-54, and not on the plaintiff's "statutory right[s]" under Title VII, *id.* 52-53, 56. In our case, however, Mr. Hoskins's statutory rights were submitted to arbitration, and there is nothing in *Alexander* that would indicate that the arbitrator's decision should not be given its normal preclusive effect.

The language of § 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991), confirms our view of the matter, for it says that, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." We are aware that the House Judiciary Committee notes relevant to § 118 state that the committee did not intend for "the inclusion of [§ 118] . . . to preclude rights and remedies that would otherwise be available [under Title VII]." H.R. Rep. No. 102-40(II), at 80 (1991). This statement, however, is ambiguous, for it might simply mean that the House of Representatives did not intend to make arbitration the sole means of vindicating the rights created by Title VII.

We agree with Merrill Lynch, moreover, that the utility of arbitration would be drastically reduced if an employee were free to relitigate an arbitrated Title VII claim in federal court. We do not see how Congress's explicit endorsement of arbitration can reasonably be read to include a denial of the primary benefit of arbitration, namely, a cost-effective and binding resolution to the dispute. Since we find that the plain language of § 118 at the very least supports the binding and preclusive nature of an arbitrator's award, we

decline to allow wholly ambiguous legislative history to undermine its apparent meaning. *See Citicasters v. McCaskill*, 89 F.3d 1350, 1354 (8th Cir. 1996).

IV.

The MCHR argues that even if Mr. Hoskins is barred from personally reasserting his arbitrated claims in court, the MCHR is not precluded from proceeding with its administrative action against Merrill Lynch on the basis of Mr. Hoskins's claims. The MCHR contends that the lack of identity and the lack of common interests between the MCHR and Mr. Hoskins prevent the ordinary principles of *res judicata* and collateral estoppel from binding the MCHR.

We recognize that there is some tension between, on the one hand, the interest in enforceable arbitration agreements and, on the other hand, the interest in independent enforcement of anti-discrimination laws on behalf of the public by agencies such as the MCHR. We agree, however, with the approach to this difficulty that was taken in *Equal Employment Opportunity Commission v. Kidder, Peabody and Company, Inc.*, 156 F.3d 298, 302 (2nd Cir. 1998), which held that in circumstances similar to ours, an arbitration agreement precludes the EEOC from seeking purely monetary relief for an employee but does not preclude it from seeking injunctive relief.

A claim for monetary relief such as back pay is highly individual in nature, and we thus conclude that when the MCHR seeks such an award, the MCHR acts more as a representative for Mr. Hoskins than as a separate entity seeking to vindicate public rights. *See Kidder, Peabody*, 156

F.3d at 301-02. If the MCHR were seeking injunctive relief for a broad class of employees, on the other hand, its efforts would presumably be aimed at a pattern of ongoing discrimination, and would involve a matter of greater public interest. *See Equal Employment Opportunity Commission v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999) ("[a]lthough the [administrative agency] acts in the public interest, even when enforcing only the charging party's claim, . . . the public interest aspect of such a claim is less significant than an [administrative agency] suit seeking large-scale injunctive relief to attack discrimination more generally").

We recognize that monetary penalties are an important component of the enforcement mechanism of the Missouri Human Rights Act. We emphasize, however, that the arbitration clause in this case does not undermine these statutory penalties: Mr. Hoskins was free to assert all of his statutory claims before the arbitrator, and indeed he did. Under these circumstances, the Supreme Court has found that arbitration is as effective a deterrent, and as effective a method of asserting individual rights, as a judicial proceeding. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function'").

V.

The MCHR argues finally that even if both it and Mr. Hoskins could be precluded by a proper agreement to

arbitrate, the agreement in this case was not in fact an "appropriate" agreement, as required by §118. The MCHR refers us to a case that held that although Title VII claims could properly be the subject of an arbitration agreement, Form U-4 did not properly inform the employee that she would be required to arbitrate claims arising out of her employment. *See Rosenberg v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 170 F.3d 1, 19-20 (1st Cir. 1999). We do not see how *Rosenberg* is relevant to our case, however, as Mr. Hoskins submitted his claim to arbitration and pursued it to a resolution. Having already submitted his claim to arbitration, Mr. Hoskins may not now assert that he was not properly apprised of the scope of the arbitration clause in his employment contract. *See Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.3d 588, 594 (8th Cir. 1998). The issue in our case is not whether Mr. Hoskins could be required to arbitrate his claim (he did so voluntarily) but rather what preclusive effect should be applied to the MCHR as a result of that arbitration. Rosenberg never addresses that question.

VI.

The district court enjoined the "defendants" from seeking individual monetary remedies on behalf of Mr. Hoskins. The MCHR is only one of the named defendants but argues that it is entitled to immunity under the eleventh amendment because it is a state agency. We agree.

State agencies acting as "arms" of the state are treated as though they were the state itself, and receive the full immunity from suit described in the eleventh amendment. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf*

and Eddy, Inc., 506 U.S. 139, 144 (1993); *see also Regents of the University of California v. Doe*, 519 U.S. 425, 429-30 (1997). Once the immunity is found to apply, it may be overcome only by a wavier of the immunity by the state, *see Puerto Rico Aqueduct*, 506 U.S. at 144, or, in certain situations, an abrogation of the immunity by Congress. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 640 (2000).

In this case, Merrill Lynch does not dispute the MCHR's contention that it is an arm of the state for eleventh amendment purposes, nor does Merrill Lynch suggest that the state's immunity has somehow been waived or abrogated. Indeed, we note that Merrill Lynch admitted in the district court that the eleventh amendment bars an award of injunctive relief against the MCHR. The discussion of eleventh amendment immunity in the district court's order, however, focused on the propriety of the suit against the individual officers of the MCHR, and never considered the question of whether the MCHR itself was entitled to immunity.

As there is no dispute that the MCHR, as a state agency, is an arm of the state within the meaning of the eleventh amendment, and no indication that either of the exceptions to eleventh amendment immunity applies, we hold that the MCHR is entitled to immunity and should have been dismissed from the suit.

VII.

Despite the fact that it did not file a notice of cross-appeal in this case, Merrill Lynch asks us to modify the

district court's order to enjoin the remaining defendants from seeking any individual injunctive relief for Mr. Hoskins. In *Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985), however, we held that "an appellee that has not filed a cross-appeal . . . may not obtain from us relief more extensive than it received in the District Court." We therefore decline to consider Merrill Lynch's proposed modification of the injunction entered below.

VII.

For the reasons indicated, we affirm the district court's order in part. We vacate the injunction with respect to the MCHR and direct the district court to dismiss the MCHR from the suit. The case is remanded to the district court for proceedings not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

Merrill Lynch, Pierce, Fenner & Smith, Inc.	)	
Plaintiff(s),	)	
vs.	)	Civil No. 98-1168-CV-W-1
Jeremiah W. Nixon, et al.	)	
Defendant(s).	)	

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ **Decision by Court**. This action has come before the Court as a briefed matter and a decision has been rendered.

ORDERED that Plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive

relief (doc. #9) is **granted** to the extent that it seeks to enjoin the defendant from pursuing monetary damages and denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief. (2) Defendants' motion to dismiss (doc. #8) is **denied**; (3) Defendants' are enjoined from pursuing Case No. E-7/94-12670 or any like claim for individual monetary remedies on behalf of Anthony Hoskins against Merrill Lynch for alleged race discrimination.

May 7, 1999
Date

ROBERT F. CONNOR, CLERK
By: /s/ Y. Johnson
Deputy Clerk

Entered on May 10, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation	)	
Plaintiff,	)	
v.	)	**Case No. 98-1168-CV-W-8-1**
JEREMIAH W. NIXON, et al.,	)	
Defendants.	)	

ORDER GRANTING IN PART MOTION FOR INJUNCTIVE RELIEF AND DENYING MOTION TO DISMISS

Plaintiff brings this action to enjoin proceedings before the Missouri Commission on Human Rights against it for alleged employment discrimination. Before the Court is (1) plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive relief and (2) defendant's motion to dismiss. For reasons stated below, plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive relief is granted to the extent that it seeks to enjoin the defendant from pursuing monetary damages and denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief. Defendant's motion to dismiss is denied.

I.

Factual Background

Anthony Hoskins ("Hoskins") was terminated from his position as a financial analyst with plaintiff Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") on January 13, 1994. Complaint ¶ 15. Five days later, he filed a Statement of Claim against Merrill Lynch with the National Association of Securities Dealers, Inc. ("NASD") alleging in his Amended Statement of Claim that he was terminated because of his race in violation of Title VII and the Missouri Human Rights Act. Complaint ¶ 17-18. An NASD arbitration panel held hearings on Hoskins' claims and on January 12, 1995, issued an award dismissing Hoskins' claims with prejudice. Complaint Ex. D.

While the arbitration award was pending, Hoskins filed a charge of discrimination with the Missouri Commission on Human Rights ("MCHR") alleging that he had been discharged by Merrill Lynch because of his race. Complaint Ex. C. The MCHR investigated Hoskins' allegations and on September 24, 1996, issued a Finding of Probable Cause thereby determining that probable cause existed to charge Merrill Lynch with terminating Hoskins because of his race. Complaint Ex. E. The Finding of Probable Cause ordered the Executive Director to "immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation, and persuasion." Complaint Ex. E.

On July 8, 1997, the MCHR, through its attorneys Jay Nixon and Keith Halcomb, advised Merrill Lynch that it

intended to hold a public hearing on Hoskins' claims and filed a complaint with the MCHR. In its amended complaint the MCHR sought an order directing Merrill Lynch to cease discriminating against Hoskins and pay him damages. Complaint Ex. F. In response, Merrill Lynch filed a motion to dismiss arguing that (1) because there had been a full and fair arbitration of Hoskins' claims, the Missouri Human Rights Act would be unconstitutional if applied against Merrill Lynch; (2) the action against Merrill Lynch was in violation of 42 U.S.C. § 1983 in that it would deprive Merrill Lynch of its federally protected rights pursuant to the Federal Arbitration Act; and (3) the MCHR's pursuit of an action after full resolution by an arbitration panel was in violation of the common law doctrine of claim preclusion and the Federal Arbitration Act. Complaint Ex. G.

On April 27, 1998, MCHR Hearing Examiner Cynthia A. Quetsch issued her Findings of Facts, Conclusions of Law, and Recommended Decision in which she recommended that Merrill Lynch's motion to dismiss be granted. Complaint Ex. I. Despite Quetsch's recommendation, Merrill Lynch's motion to dismiss was denied by the MCHR. Complaint Ex. J. Thereafter, the MCHR appointed a second Hearing Examiner, John Altergott, and notified Merrill Lynch that it intended to proceed with Hoskins' claims. Complaint Ex. K. The parties were ordered to engage in discovery and a hearing is currently set for July 20, 1999. Complaint Ex. L.

Merrill Lynch has filed a complaint in this Court seeking an Order enjoining the proceedings before the MCHR and for preliminary and permanent injunctions enjoining defendants from the further pursuit of claims against Merrill Lynch for individual remedies on behalf of Hoskins. Merrill

Lynch also seeks monetary damages.

II.

Discussion

The MCHR submits four arguments opposing Merrill Lynch's motion for injunctive relief. First, the MCHR argues that under the "well-pleaded complaint" rule this Court does not have subject matter jurisdiction to hear Merrill Lynch's claims. Second, the MCHR argues that even if this Court has jurisdiction, Merrill Lynch has failed to meet the elements necessary for injunctive relief. Third, the MCHR argues that this Court should abstain from interfering with an ongoing state court proceeding. Fourth, the MCHR argues Merrill Lynch's claims must be dismissed under the Eleventh Amendment. The Court will address each argument.

A. Well-Pleaded Complaint Rule

When jurisdiction is based on a federal question, the "well-pleaded complaint" rule requires that the "federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). Jurisdiction cannot be created by the assertion of a federal defense. See Franchise Tax Bd., 463 U.S. at 14. In declaratory judgments, a complaint is to be tested for federal jurisdiction as if the party whose adverse action the declaratory judgment plaintiff apprehends had initiated a lawsuit against the declaratory judgment plaintiff. See Public Service Commission v. Wycoff Co., 344 U.S. 237, 248 (1952). Thus, if the underlying action is one based on state law, the well-pleaded complaint rule is a barrier to

federal jurisdiction even though the complaint seeking declaratory relief is based on federal law. This is not true, however, when the plaintiff is also seeking injunctive relief. See Shaw v. Delta Air Lines, Inc. , 463 U.S. 85 (1983).

In Shaw, the Supreme Court sustained federal court jurisdiction over a lawsuit in which the plaintiff sought both declaratory and injunctive relief. Although the underlying action was based on state law (whether Delta Airlines violated the New York Human Rights Law by not providing benefits to employees disabled by pregnancy), the Court found that it had jurisdiction to determine whether the New York Human Rights Law was preempted by ERISA.

Although the Court was addressing a preemption issue, it did not rely on the "complete preemption" exception to the well-pleaded complaint rule to establish jurisdiction. Under the "complete preemption" exception, once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. See Schuver v. Mid American Energy Co., 154 F.3d 795, 798 (8th Cir. 1998). Instead, the Supreme Court found that federal jurisdiction existed because plaintiffs were seeking injunctive relief:

> It is beyond dispute that federal courts have jurisdiction over suits to *enjoin* state officials from interfering with federal rights. See Ex parte Young, 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 Led. 714 (1908). A plaintiff who seeks *injunctive* relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the

> Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n. 14 (citations omitted). See Fleet Bank, National Assoc. v. Burke, 160 F.3d 883, 888 (2nd Cir. 1998) ("[t]he Supreme Court explicitly upheld subject matter jurisdiction in Shaw on . . . the fact that plaintiffs were seeking injunctive relief to prevent state officials from interfering with a federal right.")

As in Shaw, Merrill Lynch is seeking to enjoin a state agency from encroaching on its rights as provided by the Federal Arbitration Act. Thus, pursuant to Shaw, the well-pleaded complaint rule does not deprive this Court of federal jurisdiction.

B. Injunctive Relief

The MCHR next argues that injunctive relief is not appropriate in this case. Injunctive relief is appropriate if (1) the plaintiff has a reasonable probability of success on the merits; (2) the plaintiff will be irreparably injured if relief is not granted; (3) the potential harm to the plaintiff outweighs any perceived harm to the defendants; and (4) the injunction will not harm the public interest. Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

Whether injunctive relief is appropriate in this case turns on the legal question of whether an arbitration agreement between an employer and employee precludes the MCHR from seeking relief for the employee under the Missouri Human Rights Act. Neither party has submitted a case directly on point, nor has the Court located one. However, the Court finds the Second Circuit's reasoning in

EEOC v. Kidder, Peabody, & Co., Inc., 156 F.3d 298 (2nd Cir. 1998) to be persuasive.

In Kidder, the EEOC sought back pay and liquidated damages for alleged age discrimination on behalf of nine former Kidder employees despite that the employees had agreed to submit any claims arising out of their employment with Kidder to binding arbitration. The Court held that the arbitration agreement precluded the EEOC from seeking monetary relief on behalf of the employees under the ADEA, but that the EEOC could seek injunctive relief.

In reaching its decision, the Second Circuit relied upon the Supreme Court's holding in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In Gilmer, the United States Supreme Court held that the age discrimination claims of a registered securities representative brought under the ADEA were subject to arbitration in accordance with the registration application the representative submitted to the New York Stock Exchange. The Supreme Court found there was not language in the ADEA that evidenced an intention to preclude arbitration of discrimination claims. Accordingly, the Court concluded that discrimination claims brought under the ADEA could be resolved via binding arbitration. In addressing the effect of its holding on the EEOC, the Supreme Court stated that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide or equitable relief."

Drawing from the holding in Gilmer, the Second Circuit discussed the relationship between an employee's right to pursue an action under the ADEA and the EEOC's pursuit of a separate action raising the employee's claims. Kidder, 156 F.3d at 302. The Second Circuit recognized that the EEOC's right of action is separate from the employee's action. But, that the EEOC does not significantly combat

discrimination by seeking individual monetary relief when an individual has freely contracted to arbitrate his or her discrimination claim. Id. When seeking injunctive relief, however, the EEOC not only protects individual rights, but also the rights of all United States citizens. Id. (citing EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987)). The Second Circuit thus concluded that the EEOC could not seek monetary relief but could seek injunctive relief. Because the EEOC was only seeking monetary relief, the case was dismissed.

Neither Gilmer nor Kidder are directly on point to the resolution of the matter currently before the Court. The decisions of other Eighth Circuit cases, however, make it clear that Merrill Lynch's motion for injunctive relief should be granted to the extent it seeks to enjoin the EEOC from seeking monetary relief. First, although Gilmer involved an ADEA claim, it has been held to apply with equal force to Title VII claims. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997) (holding that under Gilmer Title VII claims are subject to individual consensual agreements to arbitrate). Second, although Kidder involves EEOC proceedings, its reasoning is equally persuasive to MCHR proceedings. See id. (stating that because state anti-discrimination laws that parallel Title VII are explicitly made a part of Title VII's enforcement scheme, the FAA has the same application to claims under the Missouri Human Rights Act (MHRA) as to claims under Title VII). See also Finley v. Empiregas, Inc. of Potosi, 975 F.2d 467 (8th Cir. 1992) ("Our analysis is the same for both the state and federal claims because decisions under the various federal employment discrimination statutes are applicable and authoritative under the Missouri Human Rights Act as well as federal law.").

In light of the Supreme Court's opinion in Gilmer and

the Second Circuit's analysis in Kidder, this Court holds that Merrill Lynch's motion for temporary restraining order, preliminary injunction and other injunctive relief will be granted to the extent that it seeks to enjoin the defendant from pursuing monetary damages and will be denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief.

C. Abstention

Lastly, the Commission argues that the Court should abstain from granting the relief sought by Merrill Lynch because the state would otherwise be denied its right to interpret and enforce Missouri law. Under the line of cases stemming from Younger v. Harris, 401 U.S. 37 (1971), a federal court should not enjoin pending state proceedings where three elements are present: (1) the ongoing state proceedings are "judicial" in nature; (2) the proceedings implicate important state interests; and (3) the proceedings afford an adequate opportunity to raise the federal claims. See Middlesex County Ethics Committee, 457 U.S. 423 (1982).

All three elements required for abstention under the Younger doctrine are met in this case. First, an administrative proceeding, as the one before the MCHR, is "judicial" in nature for purposes of the Younger doctrine. Middlesex County Ethics Committee, 457 U.S. 423 (1982) (applying Younger to administrative proceedings). Second, the state undoubtedly has an interest in protecting its citizens from race discrimination. Third, it is sufficient for Younger purposes "that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Night Clubs Inc. v. City of Fort Smith, Arkansas, 163 F.3d 475, 480 (8th Cir. 1998) (citing Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629 (1986)).

Nonetheless, even if all three elements are met, a federal court should not abstain if it detects "some extraordinary circumstance that would make abstention inappropriate." Id. at 479. For instance, when an injunction is necessary to prevent great and immediate irreparable injury, a federal court is justified in enjoining a state court proceeding. Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986). A federal court may also interfere with a pending state court proceeding when a federal forum is necessary to redress an alleged deprivation of federal rights. Wooley v. Maynard, 430 U.S. 705, 710 (1977). Lastly, an exception to the Younger doctrine has been found to exist when a "state agency is engaged in a course of action openly inconsistent with a litigant's rights under Section 2 of the FAA . . ." . Olde Discount Corp. v. Tupman, 1 F.3d 202, 214 (3rd Cir. 1993).

Relying upon the Third Circuit's opinion in Olde Discount, this Court finds that the MCHR is engaged in a course of action openly inconsistent with Merrill Lynch's rights under the FAA. If forced to litigate its claim in front of the MCHR, Merrill Lynch will be irreparably harmed in that it will be deprived access to the forum that it and Hoskins contractually chose to resolve their dispute. Accordingly, the Court will not abstain from interfering with the administrative proceeding in this case.

D. Eleventh Amendment

Merrill Lynch concedes that it is barred by the Eleventh Amendment from recovering monetary damages against the MCHR. However, the MCHR insists that the Eleventh Amendment mandates its dismissal from this suit entirely. Contrary to the MCHR's allegations, under Ex parte Young, 209 U.S. 123 (1908), a suit for injunctive relief against a state official may go forward, notwithstanding the

Eleventh Amendment's jurisdictional bar, where as here, the suit seeks to end a continuing federal law violation.

III.

Accordingly, it is **ORDERED** that

(1) Plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive relief (doc. #9) is granted to the extent that it seeks to enjoin the defendant from pursuing monetary damages and denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief.

(2) Defendants' motion to dismiss (doc. #8) is denied;

(3) Defendants are enjoined from pursuing Case No. E-7/94-12670 or any like claim for individual monetary remedies on behalf of Anthony Hoskins against Merrill Lynch for alleged race discrimination.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATE: May 6, 1999
Kansas City, Missouri